IN PARI DELICTO: THE CONSUMER'S BEST FRIEND

I. INTRODUCTION

A substantial amount of the nation's industrial output is distributed to the consumer through franchised-dealership networks, such as those utilized in the petroleum and automobile industries. Many advantages inure to the manufacturer-supplier from the use of such dealership arrangements, but the essential element is his ability to control the final distribution of his product. Although the use of these arrangements is not necessarily anticompetitive, whenever the manufacturer reaches for final control over the distribution of his products, illegal restraints on competition may result. The dealer-franchisee is frequently financially weak when compared to the manufacturer, and is therefore in a poor position to bargain for the terms of his franchise contract. Provisions of the contract which are violative of the antitrust laws often go unchallenged. The government is virtually helpless to effectively police the entire economy and the consumer usually has too small a financial interest to warrant the massive undertaking of a private antitrust suit, and the dealer—although he has great familiarity with his franchise and a crucial financial interest—has often been denied the use of the courts to assert his rights under the antitrust laws. Courts have frequently held that, if the franchise agreement does violate the antitrust laws, the dealer, because he is a party to it, has himself violated the law and is therefore estopped from invoking the aid of the court.[1] Although the ground cited for the dismissal has often been the common-law doctrine of *in pari delicto*,[2] the rhetoric of the decisions is confusingly varied. The effect, however, has always been the same: the dealer is shunned by the court, the antitrust violation continues, and the public is exposed to that injury which the antitrust laws were intended to eliminate.

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1 *See, e.g.*, Pennsylvania Water and Power Co. v. Consolidated Gas Electric Light and Power Co., 209 F.2d 131 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954); Eastman Kodak v. Blackmore, 277 F. 694 (2d Cir. 1921).

2 Helpful texts on the subject include: Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 HARV. L. REV. 1241 (1965); Note, *Unclean Hands: The Effect of Plaintiff's Antitrust Violations on Antitrust Actions*, 113 U. PA. L. REV. 1071 (1965); Comment, *Limiting the Unclean Hands and In Pari Delicto Defenses in Anti-trust Suits: An Additional Justification*, 54 NW. U. L. REV. 456 (1959). *See generally* TIMBERLAKE, FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS (1965).

In *Perma Life Mufflers v. International Parts Corporation*[3] four Midas Muffler dealers brought an action against their franchisor claiming that certain provisions of the franchise contract violated the antitrust laws. The Supreme Court held that the doctrine of *in pari delicto* is not to be recognized as a defense to an antitrust action, and that these dealers were not barred from asserting their cause of action on other grounds because allowing recovery would promote enforcement of the antitrust laws. Critical to this second holding was the Court's characterization of the nature of the dealer's conduct in forming and complying with the illegal provisions. The Court felt that the dealers complied because compliance was the only way they could receive the benefits offered from operating the franchised dealerships. It expressly reserved the question of whether a party who voluntarily participated in the formation of illegal provisions and complied with them would be barred from asserting a cause of action. The Court's determination that the dealers' compliance was not voluntary is subject to question in that it did not consider the availability of legal remedies which would have allowed the dealers to receive the benefits of the franchise contract without complying with the illegal provisions. Additionally, some complex questions were raised and left unanswered regarding the amount of damages the dealers should recover.

II. The Context of the Case

International Parts (defendant in the district court) had been a manufacturer of exhaust system parts since 1938. Its products were marketed in the manner customary for its industry: sales were made directly, or through wholesalers, to numerous small, usually dingy, automobile repair garages. The garages sold mufflers, and other exhaust system parts, in much the same manner that they sold general automobile replacement parts and accessories. There was little product brand differentiation and almost no consumer advertising by the manufacturers. In 1955, International introduced a plan which revolutionized a large segment of the retail exhaust system market. Through Midas, a wholly owned subsidiary, franchise agreements were made with dealers who were to operate retail muffler shops. The shops were to be clean, well appointed, and were to maintain an environment appealing to the public. The shops were to display respondent's trade marks of "Midas" and "Midas Mufflers" and its service mark of "Midas Muffler Shops." Midas was to extensively

[3] 392 U.S. 134 (1968).

advertise its product on a nation-wide basis. It was to emphasize to the public that it operated a nation-wide chain of shops which were manned by exhaust system specialists, that the shops sold only Midas products, that installation would be made free in fifteen minutes on a "while-you-wait" basis, and that the Midas Muffler was guaranteed for life and would be replaced free at any Midas Muffler Shop.

The franchise agreement offered to potential dealers provided for the following: Midas would grant to each dealer an exclusive territory, would allow the display of its trade and service marks at a specified location within that territory and in local advertising, and would underwrite the cost of the muffler guarantee. The dealers were obligated to carry a full line of Midas products, to resell them only at the designated location, at prices established by Midas, and to honor the Midas guarantee. Additionally, the dealers were required to refrain from dealing with any Midas' competitor and from selling any other automobile products or accessories at the designated locations. There was no lease or purchase of equipment from Midas required, and there was no franchise fee. The franchise was cancellable by either party on thirty-days notice.

The last of the four petitioners had accepted a franchise by August 1956. Each eagerly sought and acquired additional franchises until in 1959 they operated a total of twenty Midas Shops. Each petitioner actively assisted Midas in the continuing development of the dealership plan. They contributed articles to the "Dealer Dabber," a monthly house publication, and each was selected to serve on the National Advisory Council composed of ten of the more successful dealers. The Council held extensive meetings to discuss among its members and with respondents ways and means for improving the operation of the muffler shops and for improving and promoting the Midas image. Respondents credited the Council with having a significant effect on the evaluation of the Midas Plan.

The Midas Plan proved highly successful. But in spite of the enormous profits petitioners realized from their operations, a dispute developed between them and respondents over a number of the contract provisions. Petitioners' objections, as later expressed in their complaint, included the following: A contract provision which required them to buy all exhaust system parts from Midas forced them to pay higher prices for tail pipes and clamps than those available from Midas' competitors. (Only the muffers actually bore brand identification and were covered by the guarantee). Also, the petitioners wanted to sell automobile spring and shock absorbers and other replacement parts and accessories at their Midas Shop locations. They claimed the franchise restrictions which prohibited this caused them to forfeit additional profits. Further, they alleged that Midas sold Midas branded products to other dealers at lower prices than it sold to petitioners, and that International marked, under the International brand, mufflers physically identical to the Midas branded mufflers but at lower prices than petitioners paid for the Midas muffler, and that International and Midas refused to sell the International brand to the Midas dealers. Additionally, the petitioners sought more franchises from Midas and claimed that the refusal to grant more franchises (or to waive the location requirement for sales and trademark use) caused them to forfeit additional profits. Midas alleged that the dispute centered primarily over its refusal to grant petitioners exclusive rights to develop certain market areas. One petitioner demanded Washington D.C., another sought St. Louis, and the third had a desire for all of Michigan. Petitioners claimed that International Parts, Midas, two other wholly owned subsidiaries, and ten corporate officers had conspired to form and enforce the alleged illegal provisions.

Respondents continually refused to alter the contract. Three petitioners then terminated their franchises and the fourth, after openly violating the provision, acquiesced to cancellation by Midas. Thereafter petitioners instituted a treble damage action in the district court claiming the franchise provisions violated section 1 of the Sherman Act,[4] and section 3 of the Clayton Act[5] (counts one and two) and that the price discrimination practiced by Midas and International violated section 2 of the Clayton Act as amended by the Robinson Patman Act[6] (count three). They alleged damages for the time during which they operated the muffler shops and for profits that would have been earned had Midas granted the new franchises requested.

The respondents, while denying any violation of the antitrust laws, asserted as an affirmative defense that petitioners were *in pari delicto*[7] with them and therefore were barred from asserting their cause of action. They claimed that petitioners voluntarily entered into the franchise agreements with full knowledge of their terms, actively participated in the development of the Midas Plan, and

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4 15 U.S.C. § 1 (1965).
5 15 U.S.C. § 14 (1965).
6 15 U.S.C. § 13 (1965).
7 Cases cited note 1 *supra*.

sought more franchises and exclusive marketing areas. They also claimed that petitioners ought not be allowed, after reaping enormous profits from their participation, to recover, by way of a treble damage action, additional profits. Petitioners, in reply, asserted two theories. First, they argued that the Supreme Court had disallowed the defense in antitrust actions and second, if the defense did apply to antitrust actions, it did not apply to their case because their participation had been coerced by economic necessity.[8] The district court granted respondents' motion for summary judgment.[9] It held that:

> [E]ach plaintiff voluntarily entered into the franchise agreement at issue and accepted the benefits therefrom. They are . . . *in pari delicto* with defendants, and therefore unable to reap the harvest of their own misdeeds . . . . Under no circumstances could "coercion" be said to be a factor herein.[10]

On appeal in the United States Court of Appeals for the Seventh Circuit,[11] petitioners advanced substantially the same arguments. In particular, they emphasized the importance of two relatively recent Supreme Court decisions, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*[12] and *Simpson* v. *Union Oil Co.*[13] In *Kiefer-Stewart* the defendants, Seagram and Calver, were suppliers of li-

[8] *See, e.g.*, Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Bales v. Kansas City Star Co., 336 F.2d 439 (8th Cir. 1964); Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.) *cert. denied*, 377 U.S. 993 (1964); Jewel Tea Co. v. Local Unions, 274 F.2d 217 (7th Cir.), *cert. denied*, 362 U.S. 936 (1960); Ring v. Spina 148 F.2d 647 (2d Cir. 1945).

[9] Perma Life Mufflers, Inc. v. International Parts Corp., 1966 Trade Cas. ¶ 71,801 (N.D. Ill. 1966) (Counts one and two). As an alternative ground for granting respondents' motion for summary judgment, the district court held that because the corporations were family owned, and operated as a single unit, they could not have conspired within the meaning of the Sherman Act. The court of appeals affirmed this holding, Perma Life Mufflers, Inc. v. International Parts Corp., 376 F.2d 692 (7th Cir. 1967). The Supreme Court reversed, holding that Midas and International Parts had conspired; that a combination had existed between Midas and each of the petitioners as of the time he unwillingly complied with the restrictive provisions, and between Midas and its other dealers whose compliance was obtained by threats of termination.

The district court also granted respondents' motion for summary judgment on count three (price discrimination), Perma Life Mufflers, Inc. v. International Parts Corp., 1966 Trade Cas. ¶ 71,802. The court of appeals reversed this holding and the issue was not carried to the Supreme Court.

[10] 1966 Trade Cas. at 82,705-06.

[11] 376 F.2d 692 (7th Cir. 1967).

[12] 340 U.S. 211 (1951).

[13] 377 U.S. 13 (1964).

quor to the wholesale market. Kiefer-Stewart, a wholesaler, alleged that after the OPA retail price restrictions were removed, defendants conspired to fix the maximum resale price of their products at the previous OPA levels. Kiefer-Stewart refused to observe Seagram's price policy and both Seagram and Calvert refused to supply it. It then brought a treble damage action in defense of which Seagram alleged that plaintiff had conspired with other wholesalers to fix a higher resale price for defendants' products. Because plaintiff had committed an antitrust violation similar to that violation charged against defendants, it was barred from recovery. The Supreme Court in rejecting defendant's argument held:

> [I]f petitioner [*Kiefer-Stewart*] and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those they injured. . . .[14]

Petitioners in *Perma Life* claimed that this case clearly shows the Supreme Court's policy that common-law doctrines which deny an injured party a remedy because of his illegal conduct ought not bar an antitrust action.

In *Simpson* the plaintiff was an operator of one of defendant Union Oil's gasoline service stations. The premises were leased on a yearly, renewable basis. Concomitant to the lease, Simpson and Union entered into a consignment contract that provided, *inter alia*, that gasoline consigned to Simpson would be retailed at prices specified by Union. The consignment contract, by its terms, terminated at the expiration of the lease. When Simpson found himself losing business to price-warring competitors, he objected to the resale price provision and insisted that Union remove it from the contract. Union refused and Simpson eventually stopped complying with the provision. When his lease was not renewed he brought a treble damage action claiming damages for the profits lost as a result of complying with the alleged illegal provision and for termination of his lease. Union denied the alleged antitrust violations and argued that even if a violation were assumed, Simpson suffered no compensable damage. He had voluntarily accepted the lease-consignment agreement with full knowledge of its terms. He should not be allowed to recover damages caused by his own act. The district court granted

14 340 U.S. at 10.

Union's motion for summary judgment and the Court of Appeals for the Ninth Circuit affirmed.[15] The Supreme Court reversed, holding that Simpson alleged compensatory damages.

> The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws.
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> . . . If that were a defense [that dealers need not agree to the contracts], a supplier could regiment thousands of otherwise competitive dealers in resale price maintenance programs merely by fear of non-renewal of short-term leases.[16]

Petitioners in *Perma Life* argued that they were in substantially the same position as Simpson was; that that case necessarly eliminated *in pari delicto* as a defense to an antitrust action and it should be controlling as to their case. In the alternative they argued that even if *Kiefer-Stewart* and *Simpson* were not dispositive of the *in pari delicto* defense in antitrust actions, their acceptance of and participation in the Midas Plan was obtained by economic coercion and thus would not support the *in pari delicto* defense.[17] Acceptance of the plan, they argued, was a necessary condition of doing business with Midas and the only way they could avail themselves of the profits realizable from operating a specialized exhaust system shop. The court of appeals, however, distinguished both *Kiefer-Stewart* and *Simpson*. The former case, the court held, only applied to the factual situation there involved; that is, when the plaintiff's violation was independent of the defendant's violation. Here, the petitioners were parties to the contract which they alleged was in violation of the antitrust laws. In *Simpson* the Supreme Court did not mention *in pari delicto* and it did not intend its decision to affect it as a defense. Further, the court stated:

> It appears that the hard core basis for the Court's decision resides in the fact that Union Oil was in a position by means of a lease to coerce Simpson to sell at prices fixed by Union Oil. . . . When Simpson refused to comply with the terms of the consignment agreement, Union Oil cancelled his lease. By this action Simpson was deprived not only of the right to purchase from Union Oil but simultaneously of a place to do business. . . .[18]

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15 Simpson v. Union Oil Co., 311 F.2d 764 (9th Cir. 1963).

16 377 U.S. at 16-17.

17 Cases cited note 8 *supra*.

18 376 F.2d at 697.

The court of appeals went on to state, regarding petitioners' participation in the Midas Plan:

> Without restating the facts of the instant cases, it is sufficient to note that they are a far cry from those considered by the Supreme Court in *Simpson.*[19]

III. Common Law Background

The above decisions reveal substantial confusion regarding the definition and application of the *in pari delicto* defense and two other related common-law defenses which, if applicable, bar a plaintiff from asserting his cause of action because some violation of the law or unconscionable conduct has made him unfit to invoke the aid of the court. A clarification of the factual distinctions on which the different defenses rely seems necessary for a full understanding of the *Perma Life* decision.[20]

The most comprehensive of the common law defenses is that of "unclean hands". Its application bars a plaintiff's cause of action because of his conduct with regard to the matter in litigation. He need not have been a party to the defendant's violation. It is enough that his violation or inequitable conduct is related to the litigation.[21] For example, a plaintiff who would attempt to enforce an unconscionably harsh contract,[22] or to effect a forfeiture which would have been avoided but for his lack of good faith in dealing with the other party,[23] or to offer perjured testimony,[24] or to use the power of the court for some other improper motive, such as harassing the defendant,[25] may be barred from the court.

In pari delicto has been considered by some courts to be but a corollary of the unclean hands doctrine.[26] Generally it applies only when the plaintiff and defendant are in privity as to a violation of

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19 *Id.* at 698.

20 Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138, 153 (1968).

21 Keystone Driller Co. v. General Excavator Co., 290 U.S. 240 (1933).

22 Newton v. Illinois Oil Co., 316 Ill. 416, 147 N.E. 465 (1925).

23 Rock v. Mathews, 35 W. Va. 531, 14 S.E. 137 (1891). *See also* Dunscombe v. Amfort Oil Co., 201 Ky. 290, 256 S.W. 427 (1923).

24 Donnell v. Howell, 257 N.C. 175, 125 S.E.2d 448 (1962).

25 Peltzer v. Gilbert, 260 Mo. 500, 169 S.W. 257 (1914); Cook v. Cupman, 30 N.J. Eq. 114 (1927).

26 Morrissey v. Bologna, 240 Miss. 284, 123 So. 2d 537 (1960), *cert. denied*, 366 U.S. 212 (1961).

the law[27]—*e.g.*, when they are parties to an illegal contract or conspiracy. The doctrine would, accordingly, bar an action brought by one thief to recover a distribution of the loot from his accomplice.[28] The rationale of the doctrine, as in the unclean hands doctrine, is to prevent the court from being used as a tool of the wrongdoer.

A third situation occurs where the plaintiff is found to have, by his conduct, consented to the defendant's violation. Recovery is denied to the plaintiff on one of two theories. Some courts consider that a plaintiff who has consented to the defendant's action has suffered no compensable injury. He has, in effect, no cause of action.[29] Other courts reason that a plaintiff who has consented to the defendant's conduct and voluntarily put himself in a position to become a litigant ought not to be allowed to profit by a court imposed damage award. Here the plaintiff is considered barred from asserting his cause of action.[30]

It should be noted that these three defenses, unclean hands, *in pari delicto*, and consent, often overlap. When the parties are *in pari delicto*, for example, they certainly have unclean hands and each can be said to have consented to the other's violation. Additionally, the questions of when a plaintiff's violation is closely enough related to the litigation to bar him under the doctrine of unclean hands, and whether the plaintiff participated in the same venture with the defendant so as to bar him under the doctrine of *in pari delicto*, appear to be but matters of degree. A further point adding to the confusion of these defenses is that courts often mismatch the name of the defense with the factual situation before them. In particular, the term *in pari delicto* is frequently used in a broad sense to apply to all three defenses.[31]

These defenses ought not be confused with what is generally termed the affirmative defense of illegality. Here the defense is asserted against the plaintiff's cause of action, not as a bar to its assertion. With the exception of one early precedent to the contrary,[32] it is generally held that a plaintiff's antitrust violation is not a defense

27 Rock v. Mathews, 35 W. Va. 531, 14 S.E. 137 (1891).

28 Boylston Bottling Co. v. O'Neill, 231 Mass. 498, 121 N.E. 411 (1919); Woodson v. Hopkins, 85 Miss. 171, 37 So. 1000 (1905).

29 1 HARPER & JAMES, TORTS, 232-37 (1965); PROSSER, TORTS, 33-34, 102-04 (3d ed. 1964).

30 *Id.*

31 *See* note 20 *supra*.

32 Continental Wall Paper Co. v. Louis Voight & Sons Co., 212 U.S. 227 (1909).

to a cause of action not based on the antitrust laws.[33] For example, in *Bruce's Juices, Inc.* v. *American Can Co.*,[34] Bruce's had defaulted on a note made to American as payment for the purchase price of cans. In an action brought by American to recover on the note, Bruce's asserted lack of consideration as a defense. The claim was based on an allegation that American had violated the antitrust laws by price discrimination on the purchased cans and that such violation voided the consideration. The defense was denied, substantially on the ground that there was no direct relationship between the amount of damages Bruce's sustained as a result of the alleged price discrimination and the amount of the obligation it was seeking to avoid.

The *Kiefer-Stewart* case presents a factual situation applicable to the unclean hands defense. The Supreme Court made no attempt to identify which common law defense was involved or to limit its holding to the factual situation of the case. In fact, a number of federal courts initially interpreted the case as eliminating all forms of the defense.[35] In *Simpson* the parties argued the case on a consent basis[36] and the district court[37] and court of appeals[38] seemed to base their holdings on that principle. The Supreme Court did not discuss or identify the particular defense involved. Mr. Justice Harlan, however, pointed out in his opinion in *Perma Life*[39] (concurring in part and dissenting in part) that *Simpson* could be considered either a consent case, if acceptance of the illegal contract constituted a violation, or an *in pari delicto* case if only the compliance with the illegal provisions was a violation.

All three factual situations were present in the *Perma Life* case. It was alleged that petitioners voluntarily accepted the franchises. This seemingly would create a question of whether they consented to respondents' violations. Secondly, it was alleged that petitioners

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33 *See, e.g.*, Kelly v. Kosuga, 358 U.S. 516 (1959); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902).

34 330 U.S. 743 (1947), *aff'g* 155 Fla. 877, 22 So. 2d 461 (1947).

35 Interborough News Co. v. Curtis Pub. Co., 108 F. Supp. 768 (S.D.N.Y. 1952); Trebuhs Realty Co. v. News Syndicate Co., 107 F. Supp. 595 (S.D.N.Y. 1952); Franchon & Marco v. Paramount Pictures, Inc., 100 F. Supp. 84 (S.D. Cal. 1951), *aff'd* 215 F.2d 167 (9th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955).

36 *See* Brief for Petitioners and Respondents, Kiefer-Stewart Co. v. Joseph E. Segram & Sons, Inc., 340 U.S. 211 (1951).

37 Simpson v. Union Oil Co., 1961 Trade Cas., Para. 69, 936 (N.D. Cal. 1960).

38 Simpson v. Union Oil Co., 311 F.2d 764 (9th Cir. 1963).

39 392 U.S. at 155.

actively participated in the development, or evolution of the Midas Plan. On this point *in pari delicto* could be said to apply since the allegation was that they participated with respondents in the illegal combination or conspiracy. Further, it was alleged that petitioners each sought to obtain a monopoly over a large distribution area. Since petitioners claimed that respondents would not grant the monopoly there is no basis to support a claim of conspiracy between petitioners and respondents on this issue. Petitioners' efforts at monopolization would apply only to the defense of unclean hands.

The district court and the court of appeals, however, considered these three allegations together in concluding they supported the *in pari delicto* defense. Additionally, these two courts used the combined effect of the three allegations to support their finding that the petitioners voluntarily accepted and participated in the Midas Plan.

IV. The Supreme Court

On certiorari the Supreme Court characterized petitioners' participation in the Midas Plan with greater clarity. First, the Court noted that the mere voluntary acceptance of the franchise would not bar their recovery. *Simpson* was cited as controlling on this point. Second, and of much significance, the Court stated that although it may be found that petitioners did participate voluntarily with respect to some aspects of the franchise plan, they could not be charged with being participants as to the creation of the whole of the plan. This the Court concluded from Midas' unwavering retention of certain provisions objected to by petitioners and the over-all "take it or leave it" basis of the franchise system. The Court noted that although petitioners sought the franchise actively, they did not seek each and every provision. Petitioners' participation as to the whole of the franchise plan could not be said to have been voluntary in any "meaningful sense of the word."[40] Although the Court pointed out that the involuntary nature of petitioners' acceptance of and participation in the overall plan was enough to deny application of the doctrine of *in pari delicto* if it applied to antitrust actions, it went further and held that

> [T]he doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action.[41]

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40 *Id.* at 139.
41 *Id.* at 140.

The use of the term "complex scope, contents, and effects" with respect to *in pari delicto* seem most assuredly to mean that the Court intended to refer not only to *in pari delicto* in its narrow sense but also meant to include the related doctrines of consent and unclean hands. It seems to be a safe conclusion that attempts to distinguish future cases from *Perma Life* on the basis of technical distinctions of common-law doctrines will be futile. This conclusion is entirely consistent with the Court's expressed policy regarding the application of common-law barriers to antitrust actions.

At common law the doctrine of *in pari delicto* was imposed to preserve the integrity of the court by preventing it from being used as a tool by wrongdoers seeking to promote and profit from their own wrongs, and by allowing it to avoid a tainting association with the corrupt. However, in *Perma Life* Mr. Justice Black stressed a contravening policy:

> We have often indicated the inappropriatenese of invoking broad common-law barriers to relief where a private suit serves important public purposes.[42]

He noted that Congress had, by providing the treble damage remedy, expressed the intention that the public is best protected from anti-competitive combinations by having the antitrust laws enforced, and that the Sherman Act makes no provision for the defense of *in pari delicto*. Allowing a plaintiff's moral reprehensibility, or his incidental windfall gain, to bar his action would undermine the usefulness of the treble damage remedy as a deterrent to antitrust violations.[43] In fact, the Court granted certiorari because:

> [T]hese rulings of the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States. . . .[44]

It should, however, be remembered that the Court characterized this case as being one where the petitioners participated as to some aspects of the illegal scheme, but did not participate voluntarily in the whole of the arrangement. The Court expressly reserved the question of whether a party who truly participated in the promulgation and support of the illegal agreement as a whole would be barred from asserting his antitrust action on a basis wholly apart from *in pari delicto*.[45]

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[42] *Id.* at 138.
[43] *Id.* at 139.
[44] *Id.* at 136.
[45] *Id.* at 140.

In separate opinions Justices Fortas, Marshall and Harlan, joined by Stewart, expressed the belief that the doctrine of *in pari delicto,* although not applicable to this case because of the involuntary nature of petitioners' participation, should be applied to situations of fully equal participation. They emphasized that it would be inconsistent with public policy to allow such a plaintiff to reap the profits of a treble damage award. Mr. Justice Harlan stated:

> Even if the threat of intra-conspiracy treble damages had some deterrent effect, however, I should not think it a too 'fastidious regard for the relative moral worth of the parties' . . . to decline to sanction a kind of antitrust enforcement that rests upon a principle of well-compensated dishonor among thieves.[46]

Mr. Justice White concurred in the Court's opinion and added that he thought the matter was best considered as one of causation. Since the petitioners here did not voluntarily participate as to the whole of the plan, they could not be said to have been a substantial cause of their injury. But, if they were equally responsible, they should be denied recovery because they would then be a substantial factor in the cause of their own injury.

The Court, after dismissing the doctrine of *in pari delicto* as a defense to an antitrust action went on to state that:

> [O]nce it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation should not be a ground for completely denying him the right to recover which the antitrust acts give him.[47]

Thus the Court apparently concluded that allowing a plaintiff in the position of petitioners to recover would promote enforcement of the antitrust laws by enlisting a significant number of "private attorneys general."

V. Voluntary or Involuntary Participation?

The Court's conclusions that petitioners complied with the illegal provisions of the franchise as a necessary condition for doing business and that their limited participation in the development of the Midas Plan was only an attempt to make the best of an arrangement over which they had little control, seems to be subject to question. Petitioners operated Midas Shops for about four years. They were not financially anemic; to the contrary, they rapidly expanded

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46 *Id.* at 154.
47 *Id.* at 140.

the number of shops which they operated and they realized very substantial profits. Their combined sales for the four years of participation in the plan exceeded four and one half million dollars. This amount was more than twenty-five percent of Midas' sales.[48] It was not until they left the Midas Plan and accepted franchises from a Midas competitor that they turned their attention to the courts. During their four years of compliance, the public was exposed to the injury inherent in antitrust violation. The Court felt that petitioners' long-term compliance should not bar their action because it was the only way that they could receive the benefits—the profits—which the franchise plan offered. If these petitioners had not accepted the plan, others would have.

The question is whether the law provides a means whereby petitioners could have enjoyed the profits offered by the Midas Plan without forcing them to comply with those provisions which were violative of the antitrust laws. A party who accepts a franchise and complies with its conditions when the law offers him an alternative does so voluntarily. Although the law is not yet certain, there is strong support for the proposition that a franchise dealer can have injunctive relief[49] against enforcement of the illegal provisions and against a retaliatory cancellation of his franchise. Even if injunctive relief is not available, a dealer may recover damages for the cancellation of his contract if such cancellation is used as a means of enforcing illegal contract provisions.[50]

An acute problem which often faces a dealer who would litigate his franchise contract is that the franchisor might retaliate against the commencement of the action by terminating the dealership. If the dealer cannot be protected against a retaliatory cancellation he can often be expected to shy away from a law suit. This is particularly true for a long-established dealer. Even if damages for cancellation are available, he may well decide to live with the franchise contract rather than lose his business. Because it is difficult to make abstract conclusions as to when injunctions will issue, and because

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48 Brief for Respondents at 13, Perma Life Mufflers v. International Parts Corp. 392 U.S. 134 (1968).

49 As a general rule the doctrines of *in pari delicto* and unclean hands have not been applied in antitrust actions for injunctive relief. *See, e.g.*, Gray Line, Inc. v. Gray Line Sightseeing Cos. Assoc., Inc., 246 F. Supp. 495 (N.D. Cal. 1965); United Cigar-Whelan Stores Corp. v. H. Weinreich Co., Inc., 107 F. Supp. 89 (S.D. N.Y. 1952). *But see* Graham v. Triangle Pub., Inc. 233 F. Supp. 825, *aff'd.* 344 F.2d 775 (3d Cir. 1965).

50 *See* notes 64 and 73 *infra*.

the law with respect to the availability of injunctive protection against franchise cancellation is undergoing rapid and substantial evolution, the applicable precedent should be noted.

Section 16 of the Clayton Act[51] is the primary source of federal court authority to enjoin antitrust violations in private actions. This section provides both for the issuance of permanent injunctions and for the issuance of preliminary injunctions when a danger of irreparable loss or damage is shown to be immediate. Courts generally agree that, regardless of how ascertainable damages might be, the irreparable loss or damage requirement is satisfied if obliteration of a business is threatened.[52]

Much of the litigation on this injunctive issue has centered on the question of whether the threatened cancellation of the contract is, in itself, an antitrust violation within the scope of section 16. Many early decisions held that it was not. They considered the cancellation to be a contract right which was unaffected by an antitrust violation. These decisions have emphasized two theories. First, they rely on the principal that courts cannot make or alter the parties' contract.[53] Secondly, the decisions have often held that the *Colgate*[54] doctrine, that businessmen have a basic freedom to select those with whom they will conduct business and are free to refuse to deal with any party, is controlling. The cancellation is just a means used to express the right to refuse to deal and, therefore, is not an antitrust violation.[55] However, two of the circuit courts of appeal[56] have held that even assuming cancellation is not in itself an antitrust violation, the federal courts have general equity power, notwithstanding section 16, to enjoin use of an otherwise valid short-term cancellation clause when it is used to frustrate antitrust litigation.

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51 15 U.S.C. § 26 (1965).

52 MacIntyre, *Antitrust Injunctions: A Flexible Private Remedy*, 1966 DUKE L.J. 22, 28.

53 Simpson v. Union Oil Co., 162 F. Supp. 746 (N.D. Cal. 1958); Ball v. Paramount Pictures, Inc., 57 F. Supp. 505 (W.D. Pa. 1944). *See generally*, Gellhorn,*Limitation on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465.

54 United States v. Colgate & Co., 250 U.S. 300 (1919).

55 House of Materials, Inc. v. Simplicity Pattern Co., Inc., 298 F.2d 867 (2d Cir. 1962); *cf.* Albrecht v. Herald Co., 367 F.2d 517 (8th Cir. 1966), *rev'd*, 390 U.S. 145 (March 4, 1968); Klein v. American Luggage Works, Inc., 323 F.2d 787 (3d Cir. 1963). *See also* Fulda, *Individual Refusals to Deal: When does Single-Firm Conduct Become Vertical Restraint?*, 30 LAW & CONTEMP. PROB. 590 (1965).

56 Bergen Drug Co., Inc. v. Park, Davis & Co., 307 F.2d 725 (3d Cir. 1962); House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962). *Cf.* Dart Drug Corp. v. Parke, Davis & Co., 344 F.2d 173 (D.C. Cir. 1965).

Another theory for granting injunctive relief was expressed in *Bateman v. Ford Motor Co.*[57] Dealer Bateman brought an action in the district court alleging violation of the Dealers Day in Court Act.[58] He sought damages, a permanent injunction, and a preliminary injunction against cancellation of his dealership. The district court refused to issue the preliminary injunction on the grounds that the Act itself did not provide for injunctive relief and it was not an antitrust law so section 16 of the Clayton Act was not a source of authority for an injunction. The court of appeals reversed, noting that:

> To make the remedy provided by the statute effective in accomplishing what is meant to be accomplished, we think that the dealer needs equity help in keeping his business going while his legal claim is being tested. A judgment for damages acquired years after his franchise has been taken away and his business obliterated is small consolation to one who, as here, has had a Ford franchise since 1933.[59]

It seems to be a reasonable conclusion that the treble damage remedy provided for violations as those alleged in *Perma Life* would also be made more effective by giving the dealer protection from retaliatory cancellation.

In another automobile franchise dealer case, *Englander Motors, Inc. v. Ford Motor Co.*,[60] the dealer claimed damages resulting from the forced sale of his business. He claimed that Ford used the short-term cancellation provision in an attempt to force him to comply with illegal provisions in the franchise and later to force him to sell his business to a Ford designee at an unfair price. The court held that the use of an otherwise valid short-term cancellation provision to effect an antitrust violation is, in itself, an antitrust violation.

The Supreme Court has sanctioned the theory expressed in *Englander*. In *Poller v. Columbia Broadcasting System, Inc.*,[61] plaintiff Poller owned and operated a UHF television broadcasting station in Milwaukee. The station, WCAN, was affiliated by contract with CBS. CBS purchased a competing Milwaukee UHF station, then cancelled WCAN's affiliation under a six-month cancellation provision, and later purchased WCAN for what plaintiff alleged to

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57 302 F.2d 63 (3d Cir. 1962).
58 15 U.S.C. §§ 1221-25 (1965).
59 302 F.2d at 66.
60 267 F.2d 11 (6th Cir. 1959).
61 368 U.S. 464 (1962).

be a distressed price resulting from WCAN's loss of network affiliation. Poller alleged that the cancellation provision was used to further defendants' conspiracy in restraint of trade and to create a monopoly. The district court granted defendants' motion for summary judgment on the ground that the cancellation was merely the exercise of a legal right of a producer to select the outlets for its products. The Supreme Court reversed and remanded, holding that:

> [I]f such a cancellation and purchase were part and parcel of unlawful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade, control a market, or monopolize, then such conduct might well run afoul of the Sherman Law.[62]

In sum, there are three theories on which injunctive relief can be granted. The federal courts have general equity power to restrain cancellation when it is being used as a means to frustrate litigation. The courts have general equity powers to issue preliminary injunctions to make more effective an existing remedy. Finally, the act of cancellation can be an antitrust violation, in which case section 16 provides direct statutory authority.

These cases indicate the broad areas on which preliminary injunctive relief can be—and has been—granted. The cases are relatively recent and the law on the subject is not clearly defined nor without contradiction.[63] The bulk of the attention that the Supreme Court has given to the injunctive issue has been in government cases where only a permanent injunction was involved. Here the protection of a vendee from retaliation by the defendant vendor is not directly at issue.[64] The temporary injunction question is by its very nature one that often becomes moot before reaching the appellate courts.[65] A more significant limitation on the amount of litigation

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62 368 U.S. at 468-9. *Compare* Poller and Englander *with* Osborn v. Sinclair Refining Co., 324 F.2d 566 (4th Cir. 1963) (discussed in text to note 69 *infra*) and Simpson (discussed in text to note 13 *supra* and note 70 *infra*). In the former cases the courts stressed that the defendants were using the cancellation clause to "take over" the dealers' business. In the latter cases the service stations reverted to the oil companies, but the courts emphasized only that the cancellation clauses were used to coerce the dealers into compliance with the franchise provisions. *Cf.*, Silver v. New York Stk. Exch., 373 U.S. 341 (1963). *See*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

63 *See, e.g.*, House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962); Deltown Foods, Inc. v. Tropicana Prod, Inc., 219 F. Supp. 887 (S.D. N.Y. 1963); Simpson v. Union Oil Co., 162 F. Supp. 746 (N.D. Cal. 1958); Ball v. Paramount Pictures, Inc., 57 F. Supp. 505 (W.D. Pa. 1944).

64 *But see* Dart Drug Corp. v. Parke, Davis & Co., 344 F.2d 173 (D.C. Cir. 1965).

65 *But see* Bateman v. Ford Motor Co., 302 F.2d 63 (3d Cir. 1962) (Discussed in

has no doubt been the application of the *in pari delicto* defense.[66] Most actions by dealers have been commenced after the franchise was terminated.

The injunctive remedy does offer the potential, if not the actual, means by which a dealer in the position of petitioners in *Perma Life* can have the benefit of operating under the contract and still avoid long-term compliance with anti-competitive provisions. Inconsistency in the lower federal courts is not a matter of much importance in Supreme Court review. None of the five separate opinions in *Perma Life* considered the issue.[67]

In addition, there is substantial precedent to support the proposition that a dealer who refused to comply with illegal contract conditions and was cancelled as a result can recover damages resulting from the cancellation. The *Poller*[68] case indicates that the Court will allow damages when cancellation was used as part and parcel of an illegal conspiracy. The case of *Osborn v. Sinclair Refining Company*[69] is directly in point.

Simpson[70] offers additional support for this proposition. *Simpson* sought damages from both forced compliance with illegal provisions and for cancellation of his lease. The Supreme Court did not discuss or decide which source of damages was recoverable, but held only that *Simpson* suffered compensable damages. It would seem inconsistent to allow recovery for injuries suffered as a result of the threatened use of a short-term cancellation clause and deny damages resulting from the actual use of the clause.

These cases have been noted to show that the dealer, in a position similar to that of petitioners in *Perma Life,* has an alternative to long-term compliance with those franchise provisions which he feels violate the antitrust laws. When these other remedies are assumed

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text to note 57 *supra.*) (Bateman's franchise had been terminated by the time the case was heard by the court of appeals. The court, however, ordered that his dealership be re-established pending litigation).

66 *In pari delicto* generally has not barred antitrust actions for injunctions, *see* note 49 *supra*. But, since the dealers generally had no cause of action for injury suffered during the time in which they complied with the franchise terms, they would not commence an action for which they needed protection from retaliatory cancellation.

67 Most of the authority for injunctive relief came after petitioners' participation in the Midas Plan. As a practical matter, no such relief may have been available to them. This point may serve as a basis for distinguishing *Perma Life* from future cases.

68 368 U.S. 464 (1962).

69 324 F.2d 566 (4th Cir. 1963). *Accord,* Lessig v. Tidewater Oil Co., 327 F.2d 459 (9th Cir.), *cert. denied,* 377 U.S. 993 (1964).

70 Simpson v. Union Oil Co., 377 U.S. 13 (1964).

to be available, the Court's conclusion that petitioners acted involuntarily is not completely tenable.

VI. Will Perma Life Aid Enforcement?

The effect of the *Perma Life* case is to give the dealer a choice of conduct. He may either bring his action as soon as the objectionable provisions come into effect, or he may continue to operate his dealership under the alleged illegal contract. According to the *Perma Life* decision, he would be suffering "damages" during this time as a result of his complying with illegal provisions. These damages would continue to accrue during the four year period imposed by the statute of limitations.[71] After four years of operation some of the accumulated damages would become unrecoverable as they fall beyond the period of the statute.[72] New damages would, of course, accumulate to replace those falling beyond the four year period of limitations. If the dealer's business is increasing, as was the case for petitioners, the amount of damages would continue to increase as long as they postponed commencing an action. The dealer's alternative to postponing his action would be to bring a suit relatively soon after the illegal provisions came into effect (or by changes in the law became illegal), to have enforcement of the illegal provisions enjoined, and to recover treble damages for the relatively short period during which he had no reasonable alternative but to comply with the conditions.

The decision in *Perma Life* will probably discourage prompt prosecution of private suits. By delaying the action for five, ten or fifteen years, a dealer can build up his business and thus the damages he will recover from the illegal restrictive covenant in his franchise. The damages will be trebled. If the dealer should decide to bring suit immediately to enjoin enforcement of the illegal provisions, his damages will be slight. His only meaningful alternative, then, is to wait for years until his damages are compounded. In the meantime the public must suffer.

Some might argue that *Perma Life* does have some deterrent effect because the franchisor will now find it economically unsound to include the illegal clauses in his franchises. This is not necessarily true. For a deterrent to be effective at all, the franchisor must know that the arrangement violates the antitrust laws, or at least he must

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71 15 U.S.C. 15(b) (1965).

72 Burnham Chemical Co. v. Borax Consolidated, Ltd., 170 F.2d 569 (9th Cir. 1948).

have some reason to suspect that it does.[73] In this writer's estimation, most franchisors do not intentionally and knowingly place illegal clauses in their contracts.

Assuming that we are dealing with a franchisor who is fully aware of the illegality of a given contract clause, *Perma Life* will allow him an avenue for escape. As will be noted in more detail later, the court suggested a unique method for determining the dealer's damages. The district court must total the harm done to the dealers by all of the illegal provisions, and then it must subtract the total benefit that the dealers obtained from the illegal provisions. The net result is the measure of damages. A franchisor who feels the need to place an illegal and detrimental (to the dealer) clause in the franchise will find it relatively easy to reduce his potential liability. He need merely place an offsetting, illegal and beneficial (to the dealer) clause in the contract!

If by some chance the franchisor is hesitant about placing an illegal clause in the contract, it is certain that the franchisee will do little to discourage him. The franchisee stands to reap a tremendous windfall gain should the clause be inserted.

VII. DAMAGES

The Court established that petitioners had a cause of action and were not barred from asserting it. It is not clear what damages the petitioners stand to recover.

First, it is obvious that the contract as a whole will not be considered. If it were, petitioners would have suffered no damages since they received enormous profits from their operations. Only the illegal provisions will be considered.

It is equally clear that the petitioners will be charged with any benefit that they received from those illegal provisions that were forced upon them. It may shock one's sense of justice to learn that a franchisor can now mitigate his liability on an illegal clause by simply placing an equally repugnant but profitable (to the dealer) clause in the contract, but he cannot mitigate his liability with a clause that is legal and beneficial. However, this is the clear implication of the Court's words:

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73 *See* Simpson v. Union Oil Co., 270 F. Supp. 754 (N.D. Cal.), petition for *writ of prohibition denied,* 385 U.S. 806 (1967) (Simpson v. Union Oil Co., 377 U.S. 13 (1964). On remand damages were denied on the ground that allowing recovery would be inequitable because Union's reliance on precedent that its consignment agreements were not in violation of the antitrust laws was reasonable).

> [T]he possible beneficial by-product of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages . . . .[74]

There is a third aspect of the damage issue. As the Court noted, petitioners could be found to have participated voluntarily as to the formation of some provisions of the plan. Hence, there are two categories of illegal provisions: those which were forced on the petitioners and those in the formation of which petitioners voluntarily participated. It is not at all clear from the opinions whether the Court will consider the effects of both types of provisions in determining damages. Arguments can be made for either position.

The situation could arise where petitioners suffer a net loss from the provisions forced on them and a net gain from the voluntarily accepted provisions. The question would then be whether the gain on the "voluntary provisions" should be deductible from the loss on the "involuntary provisions." Or, if petitioners suffered a loss on the "voluntary provisions," should that loss be added to the loss suffered on the "involuntary provisions"? It could be argued that the "voluntary provisions" should not be considered at all because, in essence, they arise from a separate cause. That is, the basis of the petitioners' action is that they were injured by illegal provisions forced on them by respondents. What arrangements the two parties may have made on a voluntary basis should have no direct bearing on the damages sustained from the coerced provisions. However, their participation did advance the illegal scheme and an attempted separation from it would seem most untenable. It is restraints of trade, not coercion, that the antitrust laws prohibit.

Further, it could be argued that petitioners' participation was merely an attempt to mitigate the harmful effects of those provisions forced on them by respondents. Any gain they realized on the illegal "voluntary provisions" should be deducted from the loss they suffered on the illegal "involuntary provisions," and any loss they suffered on the "voluntary provisions" should be added to the loss suffered on the "involuntary provisions." This would be because the petitioners should not be held accountable for any harm they suffered in a reasonable attempt to mitigate the effects of the provisions forced on them by respondents. This theory seems to give too little effect to the voluntary nature of their participation.

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74 392 U.S. at 140.

If their participation was voluntary, they need not have violated the law to mitigate their damages.

If the Court were to hold that parties to a conspiracy could recover regardless of their participation, then any loss that petitioners realized on the "voluntary provisions" would be recoverable notwithstanding the injury from the "involuntary provisions." Of course, if petitioners realized a gain on the voluntary provisions, respondents, by separate action or cross claim, would theoretically be able to recover it. On the other hand, if the Court were to disallow the assertion of a cause of action where the parties were voluntary participants as to the whole of the scheme, then it could be argued that it would be inconsistent to charge either party with profit or loss resulting from the voluntary provisions since no action would be sustained based on them alone.

The practical problems involved in trying to assess the amount of benefit or damage resulting from each of the illegal provisions would, of course, be great. If damages are assessed by computing the net effect of all the illegal provisions, taken as a whole, the complexities involved in determining damages would be reduced since the trial court would not have to isolate the effect of each provision. The court may be able, for example, to ascertain damages by comparing the profits earned by plaintiff with the profits earned by businesses similar to that of the plaintiff's business but which operated without antitrust violations. The theory of allowing damages for the total injury suffered by one participant to an illegal endeavor is not without common-law support. For example, the majority of courts will allow a participant in an illegal prize fight to recover from his opponent.[75] Further, the court has interpreted the congressional intent behind the treble damage action as being to base the penalty for violations on the amount of injury to property or business resulting from the antitrust violations.[76] The net injury to the plaintiff's business could be said to be the amount on which the "treble damage penalty" should be based.

VIII. Conclusion

By way of conclusion it should be stressed that the Court's decision in *Perma Life* involved two distinct holdings. First, the Court held that the common-law defense of *in pari delicto* (and

75 Hart v. Geysel, 159 Wash. 632, 294 P. 570 (1930) (dissenting opinion); *cf.* Hudson v. Craft, 33 Cal. 2d 564, 204 P.2d 1 (1949).

76 Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947).

the related defenses of unclean hands and consent) are not to be recognized in antitrust actions. Second, the Court allowed the dealers to assert their cause of action on the ground that allowing recovery would promote enforcement of the antitrust laws. It has been noted that the Court expressly limited the scope of its second holding to situations where the plaintiff did not voluntarily participate in the furtherance of the *whole* illegal arrangement. The Court concluded that the petitioners' participation in the arrangement was not voluntary as it was the only way they could obtain the benefits of the dealership. The present state of the law regarding the availability of injunctive protection against cancellation of the franchise contract and of damages if cancellation does occur has been noted at some length to show that dealers in the situation of petitioners most probably have an alternative to long-term compliance with illegal franchise provisions. In light of the fact that the Court omitted to consider the availability of these alternative remedies the integrity of its conclusion that the petitioners' participation was involuntary is questionable. A priori, it is not likely that allowing a plaintiff in the position of the petitioners to recover damages suffered during long-term compliance with illegal provisions will promote enforcement of the antitrust laws. Additionally, it has been pointed out that a substantial and complex question has yet to be resolved regarding the amount of damages a plaintiff to an intra-conspiracy antitrust action can recover.

Robert G. Martinell